In *Evangelical Catholic Communion, Inc.* v. *Thomas, supra,* plaintiffs sought declaratory judgment, injunctive relief and damages. The court in disposing of the equitable actions, again did not reach the issue whether an action for damages would lie.

Similarly, plaintiffs in *Hickman* v. *Wujick, supra,* and *Horn* v. *O'Chesky, supra,* were actions for equitable relief in which the respective courts did not consider the issue of damages.

Hence, none of the above-cited cases are authority for the issue before this court and should not be considered by this court as supporting a conflict among the Circuits.

Advertiser Co. v. *Wallace,* 446 F. Supp. 677 (M.D.Ala. 1978), also cited by Petitioners, while on point with the issue before this court is a lower court decision. The Fifth Circuit has not had the opportunity to consider the issue and, therefore, that Circuit may not be counted as in conflict or supporting one decision or another.

The Seventh Circuit decision, *Fulton Market Storage Co.* v. *Cullerton,* 582 F.2d 1071 (1978), *cert. den.,* 439 U.S. 1121 (1979), which may seem to be in conflict with the decision of the Eighth Circuit is devoid of certain facts with which to determine whether the opinions are in actual conflict. Nowhere is it stated in *Fulton Market* on what basis the §1983 action was premised other than general allegations regarding due process and equal protection. In contrast, the District Court decision which the Eighth Circuit affirmed, specifically held that in the circumstances *presently alleged* no cause of action would lie. The District Court's opinion recognized other circumstances in which a damage action may be available (A-7). The rejection by the Eighth Circuit of the Seventh Circuit decision is largely based on the factual allegations made by Petitioners which raise certain characteristics of the real property itself as the basis of discrimination (A-7). As Respondents have argued in Point 1 of this brief, characteristics of the property itself are an integral part of the taxation system and its implementation, and the

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-0305C(3)

Fair Assessment In Real Estate Association, et al.,
Plaintiffs,

v.

McNary, et al.,
Defendants.

MOTION BY DEFENDANTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER TO DISMISS PLAINTIFFS' COMPLAINT

Come now Defendants McNary, Skaggs, Antonio, Pung and Schneider and move the Court, pursuant to Federal Rules of Civil Procedure, Rules 12(b) and 12(h)(3), to make and enter an order dismissing Plaintiffs' complaint, for failure to state a claim for which relief may be granted, and lack of jurisdiction over the subject matter, for the reasons set forth below:

1. Plaintiff Fair Assessment in Real Estate Association lacks standing to bring this action. Plaintiffs' complaint does not allege that said association owns property in St. Louis County whose assessment was affected by the alleged actions of Defendants. Said Complaint does not allege that all of its members were affected by the alleged action of Defendants, nor are there any allegations that its interests are so related to its members as to give it standing to raise its members' rights, nor is it alleged that any of defendants alleged activities were directed toward said organization.

2. The Court lacks jurisdiction under 28 U.S.C. §1341 for the reason that Plaintiffs' Complaint would have the effect of restraining the assessment, levy and collection of taxes under state law where a plain speedy and efficient remedy may be obtained in the Missouri courts.

3. This Court should, under the principles of comity and federalism, abstain from ruling on the constitutional issues raised in this matter, for the reason that substantial issues of state law are involved, and should be considered by the Courts of Missouri, and said state court determinations may affect Plaintiffs' federal claims to a substantial degree. This Court should further abstain from a consideration of this matter, for the reason that the Missouri courts have ruled on other matters asserted in the Complaint and Plaintiffs are currently pursuing administrative and judicial remedies under Missouri law seeking relief.

4. Plaintiffs' Complaint fails to state a claim for which relief may be granted in that the allegations set forth in the Complaint (Paragraphs 15 thru 30 of the Complaint) do not state any violation of federal constitutional rights, but rather show compliance by Defendants with the assessment requirements of the Missouri Constitution, statutes and cases. Plaintiffs' complaint fails also to note the recent decisions of the Missouri Supreme Court, and the passage of legislation by the General Assembly of the State of Missouri designed to remedy the problem of assessment in the State of Missouri. Plaintiffs' complaint alleges that the Assessor is required under Missouri law to assess property at some numerical average percentage of its true value in money, which is nowhere required or even permitted by statute or the Missouri Constitution. Further, Board of Equalization reductions granted to Plaintiffs in 1977, 1978 and 1979 were clearly contrary to Missouri statutes.

5. Plaintiffs' Complaint should be dismissed for the reason that administrative and legal remedies which could afford Plain-

tiffs relief have not been exhausted, and that many of the Plaintiffs' past attempts at utilization which were unsuccessful resulted not from any actions on the part of the Defendants, but from their inability to properly prepare and present to the appropriate court or administrative body proper proof of their claims.

6. Principles of res judicata prevent Plaintiffs relitigating matters in the Complaint as the Supreme Court of Missouri has already ruled thereon.

WHEREFORE, Defendants pray that the Complaint filed by Plaintiffs herein be dismissed, and that costs be assessed against Plaintiffs in this proceeding.

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Supreme Court, U. S.
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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER

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QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. §1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 arising from Respondents' alleged past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 622 F.2d 415. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F. Supp. 1231. The opinion of the United States Court of Appeals is set out in Appendix A at page A-1 of Petitioners' Brief. The opinion of the United States District Court for the Eastern District of Missouri is set out in Appendix B at pages A-2 to A-9 of Petitioners' Brief.

JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1) because petitioner seeks by writ of certiorari a review of the judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* which was entered on June 19, 1980. The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1978.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

Respondents adopt the Statement of the Case in Petitioners' brief with the exception of Petitioners' statement regarding the basis of the District Court's order of November 7, 1979. The order of the District Court dismissing this action was based on the Tax Injunction Act and doctrines of federal abstention.

ARGUMENT AGAINST GRANTING THE WRIT

Petitioners' characterization of the conflicts among the Circuits with respect to the issue presented is misguided and misleading. At best only two Circuits have arguably reached conflicting decisions; those of the Seventh and Eighth Circuits.

Likewise, Petitioners' conclusion as to the implications of the Eighth Circuit decision is exaggerated and an impermissible extension of a narrow District Court opinion.

1. Petitioners' first argument is essentially that the implications of the District Court ruling, which the Eighth Circuit has affirmed, is that state and local officials may impose any kind of discriminatory tax without fear that the federal courts will protect those so discriminated against. Such an interpretation of the District Court decision ignores the Court's explicit finding that petitioners "have means to rectify what they consider an unjust situation through the state's own processes." (Appendix B A-8). In particular, the District Court premised its decision on "the circumstances presently alleged" *inter alia* that petitioners based their allegations of discrimination on the fact of being real property owners with new improvements and such owners who previously protested such disparity for property tax reassessment. (A-6). The Court also explicitly recognized that different considerations would lie if plaintiffs' alleged discrimination on the basis of "race, ethnic background or political affiliation" (A-7). Implicit is the distinction between characteristics of the owners (race, ethnic background, political affiliation) as opposed to characteristics of the real property itself (new as opposed to old improvements). The characteristics of the real property itself and how it is treated by taxing officials is an integral part of the taxing system and implementation of that system. Hence, the District Court concluded that the discrimination alleged was so closely allied with the system of taxation that federal court interference would be disruptive of that system and the purpose of the Tax Injunction Act would be defeated if Petitioners' action were allowed to proceed.

In summary, the District Court's opinion first recognized that Petitioner's did have an adequate state remedy which would obviate the necessity of a federal remedy and, secondly, under the circumstances alleged as the basis of discriminatory acts by taxing officials, those characteristics are intrinsic to the real property taxation system and its implementation which the federal courts have been forbidden to entertain by the very purpose of the Tax Injunction Act. Mere invocation of 42 U.S.C. §1983 does not extinguish specific legislative bars to federal court jurisdiction. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), footnote 6.

2. Petitioners' attempt to shore, up their second argument regarding the split between the Seventh and Eighth Circuits by citing cases which do not address the issue before this Court. Cases regarding tax refunds are a species of action equitable in nature which are readily distinguishable from Petitoners' damage action for actual and punitive damages. These cases did not consider the issue before this Court and should not be considered as supporting a split of authority between the Circuits.

Petitioners' also cite *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F. Supp. 1342 (D.Vt. 1973) aff'd 493 F.2d 1397 (2nd cir. 1974 (Mem); *Hickman* v. *Wujick,* 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Cheskey,* 387 F. Supp. 1280 (D.N.M. 1974) for the proposition that these cases are "to the same effect" as the Eighth Circuit decision. (Petitioners' Brief 7). While Respondents believe these cases support the Eighth Circuit decision, none of these cases address the precise issue before this court.

In *Ludwin* v. *City of Cambridge, supra,* plaintiffs brought a declaratory action and sought damages. The Court in disposing of the declaratory action therein, did not reach the issue as to damages.

District Court concluded that an action premised thereon is clearly within the prohibition of the Tax Injunction act because of the disruption such suits would cause in the state's revenue and collection systems. (A-7)

This finding clearly distinguishes the Seventh Circuit's conclusion that plaintiffs' action in *Fulton Market* would not disrupt the state's ability to collect its revenue and hence would not create the harm which the Tax Injunction Act was intended to prevent. 582 F.2d. 1071, 1078.

Secondly, the Seventh and Eighth Circuit opinions differ in their respective findings regarding state remedies. The Seventh circuit decision explicitly found that state remedies available to plaintiffs were inadequate. 582 F.2d 1071, 1080. By the very language of the Tax Injunction Act, there exists a bar to federal jurisdiction only where "a plain, speedy and efficient remedy may be had in the courts of such state."

The Eighth Circuit decision affirmed the District Court's finding that petitioners have adequate state remedies, thus barring consideration by that court. (A-8)

Hence, the conclusions reached by the two Circuits are premised on factual findings which are significantly different and which make the conflict between them more apparent than real.

This court should deny its writ of certiorari and await additional consideration of the same issue by other Circuits because of the lack of clear conflict between the only two Circuits which have thus far considered the issue.

CONCLUSION

For the reasons stated above Respondents submit that a writ of certiorari should not issue.

Respectfully submitted,

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